85-251

No. ——

Supreme Court, U.S.
FILED
AUG 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GRADY P. MORRISON,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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59 pp

QUESTIONS PRESENTED FOR REVIEW

Honorable Thomas A. Clark, of the Court of Appeals for the Eleventh Circuit, in his dissent from the denial of rehearing *en banc,* recognized the two predominant issues in this case. Petitioner will simply paraphrase Judge Clark.

I.

Whether constructive notice by mere publication in a newspaper prior to a foreclosure sale, as purportedly permitted under Alabama law, meets the "due process" requirements of the Constitution as recognized in *Mennonite?*

II.

If such newspaper notice does not invariably and in every instance comply with the requirements of "due process", what efforts to give *actual* notice of the impending foreclosure must the mortgagee undertake before the mortgagee is allowed to seek a deficiency judgment against the mortgagor?

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CONSTITUTION AND STATUTES:

U. S. Const. amend. V 2

U. S. Const. amend. XIV, § 1 3

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JURISDICTION OF THIS COURT

A writ of certiorari is sought to review the United States Court of Appeals for the Eleventh Circuit insofar as it reversed the findings and conclusions of the United States District Court for the Northern District of Alabama, and instructed the entry of a deficiency judgment against Petitioner. The jurisdiction of the Honorable Court is invoked under 28 U.S.C. § 1254(1) to review the order of the Court of Appeals entered

on November 27, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 13, 1985.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Alabama in *Federal Deposit Insurance Corporation* v. *Morrison,* as entered on August 26, 1983, and as amended on September 6, 1983, is found at 568 F. Supp. 1240. It is reproduced herein as Appendix "C". The panel opinion of November 27, 1984, entered by the United States Court of Appeals for the Eleventh Circuit is found at —— F.2d ——. It is reproduced herein, by using the slip opinion, as Appendix "A". When petitioner's application for rehearing and suggestion of rehearing *en banc* was denied on May 13, 1985, a dissent from the denial was written. That dissent is reproduced herein as Appendix "B".

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service of time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Proceedings:

This matter came to trial in the United States District Court for the Northern District of Alabama on August 17, 1983, on the complaint of Federal Deposit Insurance Corporation (FDIC) seeking a judgment for the deficiency balance on a promissory note as against Grady P. Morrison (Morrison or Petitioner), who had co-signed a promissory note with Dorothy Ray Long. A consent judgment against Ms. Long, a co-defendant, and the obligor on the note, had previously been entered in favor of FDIC on July 6, 1983.

The District Court entered its Memorandum Opinion and Order on August 26, 1983, and entered an addendum on September 6, 1983. The motion of FDIC for a new trial or for reconsideration was denied by the District Court on September 9, 1983.

FDIC filed notice of appeal to the United States Court of Appeals for the Eleventh Circuit on October 7, 1983. After oral argument on the merits of the issues

raised on the appeal, the Court of Appeals entered its decision and issued its opinion on November 27, 1984. In response to that decision Morrison petitioned for rehearing and suggested *en banc* consideration. His request was denied on May 13, 1985. There was a dissent from the denial of rehearing.

The Undisputed Material Facts:

The facts necessary to a decision of this "due process" case are few and undisputed. Most of the material facts are acknowledged in the Eleventh Circuit's opinion of November 27, 1984. All other material facts are either undisputed in the trial record or were found by the trial court on substantial evidence. These are the six essential facts which bear on the issues presented:

1. As a co-signer of a real estate mortgage and note to East Gadsden Bank, Morrison had some sort of "property right" or "interest" which was protected by the "due process" clauses of the Fifth and Fourteenth Amendments.

2. After he signed the mortgage and note Morrison conveyed his interest in the mortgaged real property to his co-signer.

3. East Gadsden Bank, FDIC's predecessor-owner of the mortgage and note, did not obtain Morrison's residence address or his business address at the time he executed the note and mortgage, and neither East Gadsden Bank nor FDIC ever notified Morrison that the note was in default, although Morrison was clearly

not hiding, and his business and residence locations were readily ascertainable. He only learned of the default and of the foreclosure sale after the foreclosure had taken place, and then only by himself approaching the Bank. It is ironic that if he had not asked, FDIC might never have located him and thus might never have sued him or perhaps the irony is that FDIC is more interested in locating targets for deficiency judgments than targets for a foreclosure notice.

4. Prior to the foreclosure sale, FDIC, the mortgagee-creditor, not only gave no actual notice to Morrison, but *did not make any attempt whatsoever* to locate him or to notify him of the impending sale which might trigger, and which, in fact, did trigger, a deficiency claim. Instead, FDIC relied exclusively on the publication of a routine newspaper notice in accordance with the "small print" terms of the mortgage instrument. Such a newspaper notice procedure has long been recognized in Alabama as sufficient to effect a valid foreclosure sale.

5. Had Morrison actually known of the impending foreclosure sale, he could and would either have paid the Bank and obtained an assignment to him of the mortgage, or he would have outbid FDIC and by so doing either eliminated all possibility of a deficiency judgment being obtained against him, or could have reduced his exposure to such a deficiency claim.

6. FDIC, contrary to its contention at trial, admitted before the Eleventh Circuit, that it is an agency of the Federal government for the purpose of its actions complying with the "due process" clause of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

Not only because of the Eleventh Circuit's complete misunderstanding of *Mennonite,* or its refusal to follow it, but because the Second Circuit is already in conflict with the Eleventh Circuit in their respective understanding of *Mennonite, Mennonite* must be explained to the Eleventh Circuit in terms which both the Eleventh Circuit and all other Courts of Appeals can understand. Otherwise, title to real property purchased at foreclosure in every State and Territory will be vulnerable, particularly in Alabama, Georgia and Florida, the States within the Eleventh Circuit, where mortgagees are continuing to employ constructive notice as the only "notice" of a prospective foreclosure sale.

A strange recitation by the Eleventh Circuit appears at page 868 of its Slip Opinion:

> *Mennonite,* which construes a mortgagee's rights in a tax sale under Indiana law, offers us little guidance in construing a mortgagor's rights in a contractual foreclosure sale under Alabama law.

If *Mennonite* provided no guidance to the Eleventh Circuit, then the Eleventh Circuit failed to comprehend *Mennonite.* The true teaching of *Mennonite* should have been quite apparent, as Judge Clark recognized in his dissent, and as Honorable Michael A. Telesca, of the United States District Court for the Western District of New York, recognized in *United States* v. *Whitney,* 602 F. Supp. 722 (1985), appeal dismissed, Docket No. 85-6094 (2nd Cir. 1985). Judge Telesca's important footnote 10 will be discussed *infra.*

The three members of this Court who dissented in *Mennonite* had no difficulty in recognizing the import and meaning of the majority opinion, which is now *stare decisis*. This understanding is revealed when at 103 S. Ct. 2713 the dissenters said:

> Today, the Court departs significantly from its prior decisions and holds that before the State conducts *any* proceeding that will affect the legally protected property interests of *any* party, the State must provide notice to that party certain to insure actual notice as long as the party's identity and location are "reasonably ascertainable". (emphasis the dissenters).

Petitioner can well understand why FDIC and other secured creditors, whether State chartered or Federally chartered, do not like *Mennonite* and want to find a way to avoid it without saying so. The Eleventh Circuit points out several means of avoidance, all spurious.

Perhaps the statement from the Eleventh Circuit which attracted Judge Telesca's attention more than any other, and which should attract this Court's attention, is found at p. 867 of the Slip Opinion:

> Foreclosure within the contractual terms and the requirements of Alabama law did not *deprive* him (Morrison) of his equity of redemption, but only *terminated* it. (emphasis supplied).

This is like saying to a death row inmate on his way to the gas chamber: "Don't worry, we are not going to 'deprive' you of your life but only 'terminate' it." Petitioner concedes that there is a distinction between the right to property and the right to life, a distinction which, in reading the decisions of the Eleventh Circuit, is obviously very important to the Eleventh Circuit,

as perhaps it should be. However, the "due process" clauses of the Fifth and Fourteenth Amendments do not make the distinction. Before a person can be deprived of either of the right to life or the right to property he must be afforded "due process".

The Eleventh Circuit's holding is that there is no requirement whatsoever that an obligor on a note secured by real estate be given actual notice of the time, place or manner of the foreclosure sale before the sale takes place, thus exposing the obligor to the very real possibility of a deficiency judgment being entered against him, without his having been afforded any meaningful opportunity to protect himself, either by bidding at the sale or by obtaining a third party bidder to compete with the mortgagee-bidder. The Eleventh Circuit goes even further by holding that the creditor does not have to make any bona fide effort to locate or to notify such a debtor of the impending sale and instead can resort exclusively to the pitifully inadequate newspaper notice in a so-called "legal publication", which, as a practical matter in Alabama, nobody ever reads except lawyers and real estate speculators.

The fact that Morrison was not even notified that the joint note was delinquent, makes it impossible for petitioner to understand or to accept the following expression by the Eleventh Circuit at page 867 of its Slip Opinion:

> The blame for turning the once hypothetical foreclosure into reality lies solely with the mortgagors. It ill becomes a solvent debtor whose delinquent note has contributed to his mortgagee's ruin to complain that the FDIC, struggling to minimize the damage from East Gadsden Bank's collapse, has been a more vigilent creditor that the bank.

How can any "blame" be assigned to Morrison when he did not even know that his fellow obligor was in arrears on her payments? There was absolutely no evidence that Morrison ever knew of the delinquency prior to the foreclosure sale, nor any evidence whatsoever that this particular loan was the cause of the financial collapse of the East Gadsden Bank, an absence of proof which illustrates how far into error the Eleventh Circuit was willing to plunge by placing "blame" on Morrison. If Morrison had actually known that the note, which the East Gadsden Bank and he both knew was being paid by someone else, and as to which, as a practical matter, he was considered only an accommodation maker, was in default, this gratuitous "cheap shot" by the Eleventh Circuit might have been called for and might have had relevance to the decision. The record, however, is quite clear that Morrison only found out about his co-maker's delinquency by personal inquiry *after the foreclosure sale had actually taken place.*

There are several other expressions by the Eleventh Circuit which do not make sense in light of the undisputed facts and of *Mennonite.* One statement by the Eleventh Circuit flatly contradicts earlier statements by the Eleventh Circuit which had clearly recognized Morrison's basic entitlement to "due process". The two viewpoints cannot be reconciled. At p. 868 of the Opinion, the Eleventh Circuit said:

> . . . We hold that he (Morrison) suffered no deprivation and consequently *is not entitled to due process.* (emphasis supplied).

This rather startling statement cannot be squared with either of the Eleventh Circuit's previous statements at p. 865 and p. 866, where the Eleventh Circuit said:

> We agree with Morrison's assertion, undisputed by the FDIC, that Alabama's equity of redemption and statutory right to redeem constitute property protected by the Fifth Amendment. The Due Process Clause "has been read broadly to extend to protection to any significant property interest".
>
> p. 865
>
> * * *
>
> Justice Brandeis found that the Act as applied resulted in a taking of property. * * * As here applied it has taken from the Bank the following property rights recognized by the law of Kentucky. * * * The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive bid or by taking the property itself.
>
> p. 866.

In the instant case, could Mr. Justice Brandeis have said that Morrison's right to protect his interest in this property by bidding at a foreclosure sale was given any real protection? Perhaps Mr. Justice Brandeis could have said so before *Mennonite,* but he could not say so today. Either Morrison was deprived of a protectible property right at the foreclosure sale, as the Eleventh Circuit *first* said, or he was not deprived of a protectible property right as the Eleventh Circuit *later* said. The opinion sounds like an attempted merger of night and day.

Perhaps the Eleventh Circuit's errors were occasioned by its failure to comprehend Morrison's argument. At p. 864 of the Opinion the Eleventh Circuit said:

> (Morrison) argues that by foreclosing without affording him a *hearing* the agency has violated the Due Process Clause of the Fifth Amendment to the Constitution. (emphasis supplied).

Morrison never argued, either to the District Court or to the Eleventh Circuit, that "due process" entitled him to a "hearing" before the foreclosure sale. He did argue, and he here argues, that "due process" requires that he be *notified in advance* of the proposed sale, or, at the very least, that the mortgagee make a bona fide effort to notify him before it resorts to a newspaper notice.

Morrison readily concedes that Alabama mortgagees have historically and traditionally relied upon the contractual provisions in their mortgage instruments which contain the so-called "power of sale", and for years have conducted foreclosure sales after a routine publication in newspapers of small circulation designed for the sole purpose of selling legal ads to lawyers and lenders. Nevertheless, even before *Mennonite,* a clear national trend had emerged putting lenders on notice that a simple reliance on the contractual "power of sale" as a technical device for cutting off by foreclosure all interests inferior to that of the mortgagee, was constitutionally suspect. For instance, such a contractual "power of sale" was once thought to be sufficient to cut off an inferior federal tax lien, but no lawyer would seriously argue that proposition today. It was not too many years ago that promissory notes in Alabama contained a so-called "acceptance of service", which purported to waive "due process" requirements and purported to permit the taking of a default judgment against the maker without actual service of

a summons and complaint on him. This practice was outlawed and discontinued long ago. In light of *Mennonite,* there is no longer any real difference between a purported contractual waiver of the "process" requirements in litigation and a contractual waiver of "due process" rights involved in a foreclosure sale. *Mennonite,* which the Eleventh Circuit dealt with in a very cursory fashion, does not stand for anything unless it stands for the proposition that all mortgagee-lenders, who are bound by the "due process" clauses either of the Fifth or of the Fourteenth Amendment, must make a bona fide effort to give actual notice to interest holders in advance of their rights being adversely affected by a foreclosure proceeding. There can simply be no other meaning given to *Mennonite.* If *Mennonite* was correctly decided it must be correctly understood.

Perhaps the most important question in the case, a question which the Eleventh Circuit conspicuously did not address but which was recognized by Judge Clark in his dissent, is: Does the right of a mortgagor, where the outcome of a suit for deficiency judgment against him will be drastically affected by the foreclosure sale, require "due process"? The right to protection against a deficiency is a "property right" which the Eleventh Circuit totally ignores. Yet the Eleventh Circuit concludes its opinion at p. 868 with the instruction to the District Court: "FDIC is entitled to judgment on its suit *for the deficiency*". If this mandate to the District Court is not altered by this Court it will mean that Morrison will have to pay the balance of another person's debt, which was secured by real property, bought at FDIC's price, with-

out Morrison's even knowing about the sale and without his ever having any opportunity to limit his exposure. The situation is closely analogous to, if not identical to, a default judgment being taken against the maker of a promissory note without any actual service of process on him and relying only upon notice published in a newspaper.

In *United States* v. *Whitney,* 602 F. Supp. 722, 732, appeal dismissed (2nd Cir. 1985), footnote 10, Judge Telesca demonstrates both the "conflict" between circuits and the Eleventh Circuit's error, when he said:

> . . . . It must be noted that the reasoning adopted by the Court of Appeals in *Morrison* is inconsistent with the result reached by the Supreme Court in *Mennonite.* Like the mortgagor in *Morrison,* the mortgagee in *Mennonite* held a substantial property right which was created by state law and subsequently nullified by a judicial sale conducted in accordance with state law. Nevertheless, the Supreme Court held that the termination of the mortgagee's lien without actual notice was a violation of the Due Process Clause, even though the tax sale procedures struck down by the Court were authorized by the same state laws which created the lien.

Correctly applying *Mennonite,* Judge Telesca then said in the body of his opinion:

> I therefore conclude that the failure to give adequate notice to defendant of the mortgage foreclosure proceeding deprived him of due process of law, in violation of his rights under both the Fifth and the Fourteenth Amendments.

602 F. Supp. 733.

As indicated by Judge Telesca in *United States* v. *Whitney,* the State of New York anticipated *Mennonite* by requiring personal service on the maker of a note prior to foreclosure as a pre-condition to any claim for a deficiency. This was a legislative recognition in New York of the "unfairness" of permitting a deficiency judgment without actual notice of the foreclosure sale. "Due process" and "fairness" are synonyms as the Supreme Court of the United States has said many times. Not just because what has thus far happened to Morrison is "unfair", and cannot be squared with "due process", and exposes one United States citizen to an unwarranted money judgment, but because of the extreme need for uniformity of understanding of the directions of the Supreme Court of the United States in *Mennonite* so that the lenders and borrowers in all fifty States and the Territories can expect that their Federal and State Courts will recognize the same "due process" requirements, this petition should be granted. A constitutional right as important as "Due Process" cannot be permitted to mean one thing in the Second Circuit and an entirely different thing in the Eleventh Circuit.

CONCLUSION

For the reasons stated, petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

No. 83-7561

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,
Plaintiff-Appellant,

v.

GRADY P. MORRISON,
Defendant-Appellee.

Nov. 27, 1984.

Appeal from the United States District Court for the Northern District of Alabama.

Before HILL and HENDERSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

ALBERT J. HENDERSON, Circuit Judge:

The Federal Deposit Insurance Corporation (FDIC) appeals from dismissal by the United States District Court for the Northern District of Alabama, 568 F. Supp. 1240, of its suit for a deficiency judgment. We reverse and remand.

On August 4, 1979, the appellee, Grady P. Morrison, and his employee, Dorothy Ray, jointly owned real estate in Ohatchee, Calhoun County, Alabama. On that date they executed an assignable Note and Security

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* Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Agreement, mortgaging their property to the East Gadsden Bank in Etowah County, Alabama. Although Ray already had moved onto the property, she gave the bank her outdated Etowah County address and phone number. Morrison supplied neither a number nor an address, even though for twenty-eight years he had received his mail at a post office box in Bynum, Calhoun County, Alabama. The contract specified that if the note should become delinquent, the mortgagee could foreclose on the property after giving notice of the time, place and terms of sale once a week for three successive weeks in a Calhoun County newspaper. Upon execution of the agreement, Morrison deeded his ownership interest to Ray, who purchased it with her proceeds from the note. The district court found that Morrison, in selling his interest to Ray, intended to convey it subject to the mortgage, thereby retaining his rights and obligations as a mortgagor.[1]

Sometime around August of 1980, Ray married, quit her employment with Morrison and moved to Florida, leaving the bank no forwarding address.[2] By December 31, 1980, the note was in arrears. On that date the Superintendent of Banks for the State of Alabama closed East Gadsden Bank. The FDIC became receiver and purchased certain bank assets, including the delinquent note. Attempting to contact the mortgagors

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[1] *Cf. Trauner v. Lowrey*, 369 So.2d 531, 534 (Ala.1979). Because the deed is not in the record, we are not in a position to consider whether the district judge's findings regarding Morrison's intent and the sequence of events are clearly erroneous under Rule 52(a), Fed.R.Civ.P.

[2] On July 6, 1983, the district court entered a consent judgment for $7,232.27 against Dorothy Long (nee Ray), who consequently is not a party to this appeal.

with respect to their default, the FDIC wrote to the outdated Etowah County address. The postal service returned these letters stamped "Authorized time for forwarding expired." In reply to a further request for the new address, the postmaster reported "No address." Morrison did not receive actual notice of default or of the FDIC's plan to foreclose. The district court found that a simple inquiry in the area of Ohatchee would have revealed the whereabouts of Morrison.

After publishing the notices required by the Note and Security Agreement, the FDIC held a foreclosure sale on April 2, 1982. The agency's lone bid of $15,640.00 prevailed, and Morrison's debt was reduced by this amount. In June, 1982, Morrison's attorney contacted the FDIC to inquire about the loan. The FDIC replied that it had foreclosed and leased the property to tenants who held a purchase option exercisable one year after the foreclosure date. The attorney reported these facts to Morrison. On August 20, 1982, the FDIC filed a complaint for the balance of the debt. Morrison did not offer to pay the debt and redeem the property until August 1983, over sixteen months after the foreclosure. The tenants had exercised their option. On August 17, 1983, the date of trial, Morrison's total deficiency was $6,461.67.[1]

In defense of this suit for his current liability on the note, Morrison does not dispute the amount. He does not claim that the FDIC breached the contract or violated Alabama law. Rather, he argues that by

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[1] The Note and Security Agreement entitles the mortgagee not only to the amount of the debt but also to interest and reasonable attorneys fees if action is taken to collect a delinquent balance.

foreclosing without affording him a hearing the agency has violated the Due Process Clause of the fifth amendment to the Constitution.[4] Morrison suggests that suspension of his responsibility for the debt would cure this violation. The district court agreed, citing *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) as authority therefor.

In response to Morrison's defense, the FDIC pointedly declines to urge that in this case it has performed only a proprietary function not subject to due process requirements.[5] Indeed, the agency admits that in liquidating this asset of a failed bank it has performed a governmental function.[6] Instead the appellant first notes that under Alabama law Morrison's right to re-

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[4] That clause in relevant part guarantees that no person shall be "deprived of . . . property without due process of law." U.S. Const. amend. V.

[5] *Cf. Warren v. Gov't Nat'l. Mortgage Assoc.*, 611 F.2d 1229 (8th Cir.1980); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977) (In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981). The FDIC seeks to avoid compromising its position in *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408 (11th Cir.1984) (Amended Petition for Rehearing and Suggestion for En Banc Consideration filed July 30, 1984). In any event we find it unnecessary to consider this issue here. *Compare Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir.1975) (reaching the issue of governmental action where foreclosure on house had deprived mortgagors of their occupancy).

[6] In fact, the FDIC obtained permisison to amend its Brief on Appeal in order to withdraw its proprietary function argument. The amended brief frankly concedes that such liquidations are a governmental function. Amendment to Brief of Appellant at pp. 2-3, 6, 11, 12-14.

deem the property after foreclosure was, though somewhat more limited, quite similar to his right before foreclosure. From this premise the FDIC reasons that foreclosure did not deprive him of any property. Alternatively, the agency asserts that the Due Process Clause does not apply because the agency has refrained from exercising governmental powers against Morrison. Finally, the FDIC claims that due process required no more than was provided here. We need not reach these questions.

The fifth amendment guarantees due process only to those deprived of life, liberty or property. *E.g., American Druggists Insurance Company v. Bogart,* 707 F.2d 1229 (11th Cir.1983); *Wells Fargo Armored Service v. Georgia Public Service Comm'n.,* 547 F.2d 938, 941 (5th Cir.1977). Precise definition of any property at stake is crucial to determining whether the government has deprived the owner. Property rights " 'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' " *Parratt v. Taylor,* 451 U.S. 527, 529 n. 1, 101 S.Ct. 1908, 1910 n. 1, 68 L.Ed.2d 420, 425 n. 1 (1981) (quoting *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972)).

Morrison, having sold his rights under the deed, and conceding he has received his every entitlement arising directly from the Note and Security Agreement, turns to Alabama law as the source of his property rights. Under Alabama common law, execution of a

mortgage passes legal title to the mortgagee, leaving the mortgagor only his equity of redemption. Payment of the debt revests title in the holder of the equity of redemption, which Alabama treats as a property interest transferable by deed. Foreclosure marks the end of this property right. *Foster v. Hudson,* 437 So.2d 528 (Ala.1983); *Trauner v. Lowrey,* 369 So.2d 531, 534 (Ala.1979); *Mallory v. Agee,* 226 Ala. 596, 147 So. 881 (1932). Upon foreclosure, Morrison gained a statutory right of redemption under Ala.Code § 6-5-230 (1975). This statutory right, though similar to the equity of redemption, is generally less valuable. Section 6-5-231 establishes a system of notice and priorities among the persons eligible to exercise that right. Even if the mortgagor himself is the first to attempt redemption, he must not only satisfy the requirements of the mortgage but also those of § 6-5-235, which mandates additional payments for permanent improvements, taxes and liens on the property. The statutory right of redemption "is a personal privilege, not a [transferable] property right," which lasts only for one year beginning on the date of foreclosure. *Foster,* 437 So.2d at 529; *Brown v. Bateh,* 362 So.2d 841 (Ala.1978).

We agree with Morrison's assertion, undisputed by the FDIC,[7] that Alabama's equity of redemption and statutory right to redeem constitute property protected by the fifth amendment. The Due Process Clause "has

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[7] In fact, the FDIC states in its briefs that equitable redemption is a property right. Brief of Appellant p. 11; Reply Brief of Appellant p. 2. The agency also acknowledges Morrison's statutory entitlement and urges the court to consider it as valuable or more valuable to Morrison than was his common law property. Reply Brief of Appellant p. 4.

been read broadly to extend protection to 'any significant property interest.' " *Fuentes v. Shevin,* 407 U.S. 67, 86, 92 S.Ct. 1983, 1997, 32 L.Ed.2d 556, 573 (1972) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, 119 (1971). Thus, the guarantee extends to property rights less substantial than full legal title, whether they come from a private contract, *Fuentes,* 407 U.S. at 86-87, 92 S.Ct. at 1997, 32 L.Ed.2d at 573, or state law. 407 U.S. at 86, n. 16, 92 S.Ct. at 1997, n. 16, 32 L.Ed.2d at 573, n. 16. Even a merely arguable right of possession constitutes property. *Id.* A "person's interest in a benefit is a 'property' interest for due process purposes if there are . . . rules . . . that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570, 580 (1972). These redemption powers, the FDIC acknowledges, entitled Morrison to the benefit of regaining full legal title immediately upon compliance with the specified financial requirements.

Bolstering our conclusion that these rights are significant rights is Justice Brandeis' long-standing and oft-cited[8] opinion for a unanimous Court in *Louisville*

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[8] For instance, the Court recently relied on *Radford* in strongly suggesting that a non-possessory, non-purchase-money lien on goods was property protected by the fifth amendment. *United States v. Security Indus. Bank,* 459 U.S. 70, 75-78, 103 S.Ct. 407, 411-412, 74 L.Ed.2d 235, 241-42 (1982) (deciding the case on another ground).

In *Security Industrial Bank* the Court also approved *Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1961). In *Armstrong* the Court found that materialmen's liens arising

Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935). There the Court struck down Congress' attempt under the Frazier-Lemke Act to bestow on farmers rights which frustrated their mortgagees' exercise of preexisting foreclosure powers. Justice Brandeis found that the Act as applied resulted in a taking of property.

> [The Act's] avowed object is to take from the mortgagee rights in the specific property held as security; and to that end "to scale down the indebtedness" to the present value of the property. As here applied it has taken from the Bank the following property rights recognized by the law of Kentucky:
>
> 1. The right to retain the lien until the indebtedness thereby secured is paid.
>
> 2. The right to realize upon the security by a judicial public sale.
>
> 3. The right to determine when such sale shall be held, subject only to the discretion of the court.
>
> 4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt,

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under Maine's commercial code were "property" even though the lienors had failed to take steps to attach their liens, and even though the United States held a paramount lien that in practical effect probably rendered the materialmen's liens worthless. 364 U.S. at 44-45, 80 S.Ct. at 1566-67, 4 L.Ed.2d at 1558-9 (citing *Radford*).

> either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
>
> 5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court. . . .

295 U.S. at 594-95, 55 S.Ct. at 865-66, 79 L.Ed. at 1607. Just as Kentucky recognized interests of the mortgagee, so Alabama here created interests in the mortgagor. Morrison's rights to regain full title to the land were no less significant property than a mortgagee's right to protect its secured loan.*

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* We give no weight to the Supreme Court of Alabama's brief reference to the statutory right of redemption as "a personal privilege, not a property right." *Foster*, 437 So.2d at 529. We do so because in its original context this quotation holds a significance different from what the fragment alone suggests. Alabama's watershed case on the statutory redemption right is *Powers v. Andrews*, 84 Ala. 289, 4 So. 263 (1888) (Stone, J., concurring in part) (adopted as governing Alabama Supreme Court precedent in *Baker, Lyons & Co. v. Eliasberg and Bros. Merc. Co.*, 201 Ala. 591, 79 So. 13 (1917)). Construing the legislative ancestor of § 6-5-230, Justice Stone explained:

> The statutory right to redeem is not property, but a mere privilege conferred by law. This naked right or privilege is not the subject of bargain or sale . . . . It is, however, a mere incident of ownership; and, if before the sale he has parted with his . . . equity of redemption, . . . he has then lost his statutory right to redeem. The one is dependent on the other, and the statutory right cannot survive its severance from the property right.

84 Ala. at 294, 4 So. at 266. Thus, a person's entitlement to redeem under the predecessor of § 6-5-230 hinged on his showing that he held an interest at the time of foreclosure. If before the sale that person had transferred his interest, he could not later claim the statutory right. Only those persons within the statute's system of

Carefully tracing the boundaries of these rights, however, we find that the FDIC has nowhere infringed upon Morrison's property. Foreclosure within the contractual terms and the requirements of Alabama law did not deprive him of his equity of redemption, but only terminated it. The state in creating this interest commanded that it should exist only up to the moment when the mortgagee properly exercised the power of sale. That such a moment was undetermined when the parties signed the mortgage did not nullify the conditional nature of his equity of redemption, any more than the unpredictability of a life estate holder's death can prevent termination of his interest when he actually dies. The blame for turning the once-hypothetical foreclosure into reality lies solely with the mortgagors. It ill becomes a solvent debtor whose delinquent note has contributed to his mortgagee's ruin to complain that the FDIC, struggling to minimize the damage from East Gadsden Bank's collapse, has been a more vigilant creditor than the bank. Under Alabama law, the equity of redemption existed only in the absence of foreclosure. Because foreclosure and the equity of redemption cannot overlap, it is impossible that this foreclosure infringed on Morrison's right. We cannot

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priorities can rely on the right. *Accord, Butler v. Fayette Seed Farms, Inc.*, 280 Ala. 482, 195 So.2d 534 (1967) (quoting *Powers*). In describing the statutory right as "not property," the Alabama Supreme Court indicates only that the right is primarily personal to those contemplated by the legislature. Of course, a state-created entitlement to redeem is no less "property" merely because it is personal than are non-transferable entitlements to a drivers license or welfare benefits. *See Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970).

give Morrison an equity of redemption any larger than the dimensions in which Alabama chose to cut it.[10]

Nor did the FDIC deprive Morrison of his statutory entitlement to redeem, which necessarily expired one year after foreclosure, precisely according to the conditions under which Alabama granted the right. Far from depriving Morrison of his statutory entitlement, the FDIC triggered it. We note in passing that Morrison received actual notice from the FDIC through his attorney, yet during the ten months remaining to exercise his statutory right of redemption he did nothing toward accomplishing that end. Morrison not only made his bed, he slept on it.

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[10] In *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), three members of the Court found that a statute giving nonprobationary federal employees the right not to be discharged except for cause gave no right beyond the extent to which it could be enforced under the discharge procedures specified in the statute creating the right. Joined by Chief Justice Burger and Justice Stewart, Justice Rehnquist reasoned, "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of [the grantee] must take the bitter with the sweet." 416 U.S. at 153-54, 94 S.Ct. at 1644, 40 L.Ed.2d at 33. Whatever may be the present force of this plurality opinion, *see, e.g., Vitek v. Jones*, 445 U.S. 480, 490 n. 6, 100 S.Ct. 1254, 1262 n. 6, 63 L.Ed.2d 552, 563 n. 6 (1980), where as here both the granted right and its simultaneously imposed limitation are substantive, we cannot disregard the latter in defining the former without contradicting the Alabama Supreme Court's construction of its own statutory and common law. *Cf. O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785-86, 100 S.Ct. 2467, 2475-76, 65 L.Ed.2d 506, 518 (1980) (Residents' entitlement to have benefits paid for their costs of living in a "qualified" nursing home does not give residents any property right in having benefits paid to their nursing home after it has lost its "qualified" status.).

Because we find no deprivation, Morrison's heavy reliance on *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), is misplaced. There the Supreme Court held that Indiana had deprived a mortgagee of his property by permitting a tax sale purchaser of real estate to acquire absolute title free of the mortgagee's lien. The state inflicted this deprivation under a revenue collection statute that at the time of the execution of the mortgage was entirely inapplicable to the mortgage contract and the mortgagee's rights thereunder. *Mennonite,* which construes a mortgagee's rights in a tax sale under Indiana law, offers us little guidance in construing a mortgagor's rights in a contractual foreclosure sale under Alabama law. Also distinguishable is *Johnson v. United States Dept. of Agriculture,* 734 F.2d 774 (11th Cir.1984) (analyzing merely the likelihood on the merits), where the Farmers Home Administration sought to foreclose after making a direct loan under Section 502, Title V of the Housing Act of 1949, 42 U.S.C. § 1472 (1980). Unlike Johnson, Morrison makes no claim that a federal statutory scheme affords him any property right here. Morrison alleges only a deprivation of the Alabama redemption rights.

Because Morrison loses nothing by the mere fact that the foreclosing mortgagee acted in observance of its congressionally mandated purpose, we hold that he suffered no deprivation and consequently is not entitled to due process. It is unnecessary for us to decide whether FDIC foreclosures might otherwise trigger the fifth amendment, whether the FDIC's notice procedures comport with due process or whether the relief suggested by Morrison would be an appropriate rem-

edy for any such violation. The FDIC is entitled to judgment on its suit for the deficiency.

REVERSED and REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-7561

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,
Plaintiff-Appellant,

versus

GRADY P. MORRISON,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

[Filed May 13, 1985. Spencer D. Mercer, Clerk]

(Opinion November 27, 1984, 11 Cir., 198—, —— F.2d ——).

(May 13, 1985)

Before HILL and HENDERSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of

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* Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ ALBERT J. HENDERSON
United States Circuit Judge

CLARK, Circuit Judge, dissenting:

I dissent from the court's denial of the petition to consider this case en banc and the consequent approval of the panel decision. As a result of the panel's reversal of the district court decision, Morrison was denied his constitutional right to notice prior to the impairment of a valuable property right. Both Morrison and an undetermined number of Alabama debtors in similar straits are deprived of valuable fifth and fourteenth amendment procedural due process rights.

The essence of the panel opinion is that a mortgagor is not entitled to personal notice of a foreclosure sale of property securing a note on which the mortgagor is an obligor. Lack of notice in this situation results in the deprivation of valuable due process rights because the amount of the highest bid at the foreclosure sale fixes the amount of the deficiency judgment which can subsequently be obtained in a lawsuit against the mortgagor, where the foreclosure sales price is less than the amount due on the note.

In the present case, Morrison and Dorothy H. Ray[1] executed a promissory note and mortgage to the East Gadsden Bank on August 4, 1979, in the amount of $18,668.63. Contemporaneously with the execution of the note and mortgage, Morrison conveyed his interest in the property to Dorothy Ray, but remained liable on the note and mortgage under Alabama law. Thereafter, F.D.I.C. became the receiver of the bank and acquired the note and mortgage. The only address appearing on the face of the note adjacent to the sig-

[1] Thereafter Dorothy Ray married and became Dorothy Ray Long.

natures of Morrison and Long was "Rt. 2, Bx. 41A, Attalla, Al. 35954," which the district court found to be "unmistakably in the handwriting of Long." There was no other address.

Attalla is in Etowah County, Alabama, and was Long's residence at the time she executed the note and mortgage. She thereafter moved into a large mobile home located on the mortgaged property which is in Calhoun County. The district court found that "the note clearly showed this address as "Rt. 1, Ohatchee." Morrison had resided in Bynum, Calhoun County, since 1953, where he was an agent for Ryder Truck Lines, owned a supermarket which he leased, operated a number of trucks and trailers, and was well known in the community. The district court found: "A simple inquiry in the area of Ohatchee would undoubtedly have led to the discovery of Morrison's proper mailing address." In September of 1981 F.D.I.C. sent a certified letter to Morrison, addressed to him at the Attalla, Alabama address, demanding payment of the past due note; that letter was returned to the sender undelivered by the post office. In November F.D.I.C. sent a letter to the Postmaster at Attalla, requesting Morrison's address, but it was returned showing "no record." In February of 1982 F.D.I.C. sent a foreclosure notice to Morrison at the Attalla address which F.D.I.C. already knew was incorrect. The property was sold without Morrison receiving any notice of the foreclosure sale. The district court found: "Morrison could have bid the full amount of the debt at the foreclosure sale. He testified that he would, in fact, have entered such a bid, but speculation on this point is unnecessary to this decision." The foregoing

facts were taken from the district court's Findings of Fact, R. 26-29.

The district court correctly stated the two issues presented as (1) whether the constructive notice by publication met the due process requirements of the Constitution; and (2) if not, whether F.D.I.C.'s efforts in this case to give actual notice fulfilled the requirements of due process. The district court, ruling in favor of Morrison, relied upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 654, 94 L.Ed. 865 (1950), and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). The Supreme Court in the *Mullane* opinion described the controversy as follows:

> This controversy questions the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law . . .

339 U.S. at 307, 70 S.Ct. at 654.

> In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. *Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.*

Id. at 313, 70 S.Ct. at 657 (emphasis added).

In *Mennonite, supra,* the Supreme Court held that "A mortgagee possesses a substantial property interest that is significantly affected by a tax sale" and "[s]ince a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale." 103 S.Ct. at 2711. In the *Mennonite* case, Indiana had sold real estate at a tax foreclosure sale after advertising the sale in the newspaper pursuant to Indiana law. The Indiana courts held this was sufficient notice to a party holding a mortgage on the real estate. The Supreme Court ruled otherwise.

The district court was eminently correct in holding that the constructive notice provided by newspaper publication of a foreclosure sale as authorized by Alabama Code § 35-10-8 (1975) was insufficient to meet the requirement of due process. In this case the failure to give notice to the obligor resulted in the establishment of the amount of a deficiency judgment which was thereafter entered against the obligor. The lack of notice clearly affected valuable property rights of Morrison.

The second issue addresses whether F.D.I.C.'s efforts to notify Morrison were sufficient to meet the standards of due process. The panel did not reach this question. The district court found "that F.D.I.C. did not make reasonably diligent efforts to ascertain Morrison's address, which could have been easily determined by appropriate inquiry." (R. 9). That finding of fact goes unchallenged by the panel decision. A similar question arose in *Mennonite, supra,* and was addressed in note 4 of the Supreme Court's opinion as follows:

> In this case, the mortgage on file with the county recorder identified the mortgagee only as "MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio." We assume that the mortgagee's address could have been ascertained by reasonably diligent efforts. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S.Ct. 652, 658-659, 94 L.Ed. 865 (1950). Simply mailing a letter to "Mennonite Board of Missions, Wayne County, Ohio," quite likely would have provided actual notice, given "the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed." *Grannis v. Ordean*, 234 U.S. 385, 397-398, 34 S.Ct. 779, 784, 58 L.Ed. 1363 (1914). We do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record.

103 S.Ct. at 2711, n.4. Given the finding of fact by the district court that the address of the property clearly appeared on the note as Rt. 1, Ohatchee, that Ohatchee was in Calhoun County where Morrison resided, that Mrs. Long had moved to Florida but had tenants living on the property, and that F.D.I.C. never made any examination of the property or inquiry to locate either Long or Morrison, I conclude that the district court did not clearly err in finding that F.D.I.C. failed to exercise the proper diligence necessary to meet the due process requirement of notice before proceeding with the foreclosure sale.

The district court was correct in holding that Morrison's constitutional rights were abridged. Morrison

had a substantial property right in being notified that the property which was security for his obligation to the East Gadsden Bank was about to be sold pursuant to foreclosure, because the high bid at the foreclosure sale would fix the amount of indebtedness which Morrison would owe to F.D.I.C., the transferee of the note. Had Morrison received notice, he could have bid on the property at the sale or arranged to find an interested purchaser who might bid. As it turned out, F.D.I.C. was the only bidder at the sale and it bid 85% of *its* appraised value of the property pursuant to F.D.I.C. regulations. The right to mitigate one's potential damages is clearly a property right; therefore, failure to give adequate notice of an event which involves the right to mitigate damages is violative of due process.

The panel opinion did not reach the issues discussed above because it found: "Foreclosure within the contractual terms and the requirements of Alabama law did not deprive him [Morrison] of his equity of redemption, but only terminated it." Slip op. at 867. The panel found that Morrison learned that the foreclosure sale had occurred two months after the sale and that he had ten months in which to exercise his statutory right of redemption but did nothing towards accomplishing that end. The panel commented "Morrison not only made his bed, he slept on it." Slip op. at 868. Finding no deprivation, the panel felt that Morrison's reliance on *Mennonite, supra,* was misplaced.

I conclude that the panel erred for two reasons. I also question whether the panel should have reached the issue of redemption. It appears this issue was not

raised in the district court, nor was addressed by that court in its opinion. The panel's reliance upon Morrison's statutory right of redemption misconstrues Alabama law as I understand that state's laws. Alabama Statute § 6-5-230 does permit the holder of an *equity of redemption* to exercise a statutory right of redemption within twelve months after a foreclosure sale. This is a savings provision in Alabama mortgage law which permits a mortgagor within twelve months after the foreclosure sale to tender to the mortgagee the amount owed on the date of the foreclosure, interest thereon, and all costs of improvements placed upon the property during the interval. As a consequence of Alabama statutes, any purchaser at a foreclosure sale is on notice that his title will not become perfect for a twelve-month period. That explains why in this case F.D.I.C. leased the property to tenants who had an option to purchase the property at the end of the twelve-month period, which option they apparently exercised. The panel reasoned that Morrison had the right to go in and pay off F.D.I.C. and thus had suffered no property deprivation by lack of notice of the foreclosure sale.

The panel errs in this respect. As I understand Alabama law, Morrison had no statutory right of redemption and could not have purchased the property. For one to have a statutory right of redemption, one must have had an equitable right of redemption on the date of the foreclosure sale. Morrison had no equity of redemption at that time because he had previously sold any interest he had in the property to Dorothy Ray Long. While she had such an equity of redemption, Morrison did not. This is recognized in a decision cited in note 9 of the panel opinion, *Powers v. Andrews,* 84

Ala. 289, 4 So. 263 (1888), where Justice Stone of the Alabama Supreme Court explained:

> The statutory right to redeem is not property, but a mere privilege conferred by law. This naked right or privilege is not the subject of bargain or sale . . . It is, however, a mere incident of ownership; and, *if before the sale he has parted with his . . . equity of redemption, . . . he has then lost his statutory right to redeem.* The one is dependent on the other, and the statutory right cannot survive its severance from the property right.

84 Ala. at 294, 4 So. at 266 (emphasis added). *See also Dominex v. Key,* 456 So.2d 1047, 1052-53 (Ala. 1984), which similarly holds that a party must have an equity of redemption in order to have the statutory right of redemption.

Thus, I find the panel's rationale that Morrison suffered no deprivation because he had a statutory right of redemption subject to question. Given the precedential Constitutional principle involved in the decision, this case is worthy of en banc consideration by our court.

Even if Morrison had an equity of redemption in the property, I nevertheless would conclude that he had been deprived of a valuable property right when he was not given notice of the foreclosure sale. If Morrison had received notice that the note was in default and foreclosure was being undertaken, he had the following possible remedies: (1) he possibly could have made the delinquent payments or other arrangements with the F.D.I.C. and arranged with Dorothy Ray to take over the property from her; (2) he could

have arranged financing with another lending institution; (3) he could have arranged to have persons interested in the property bidding against the F.D.I.C. at the foreclosure sale in an effort to bring the true market price; or (4) he could have taken steps to find a buyer of the property who could take over the loan.

While the foregoing possibilities are speculative, these were rights which Morrison should have been afforded. It is common knowledge that foreclosure sales after a legal notice in the legal advertisement section of the newspaper ordinarily do not bring market price. The gravamen of permitting an indeterminate deficiency judgment to be fixed against a mortgagor who does not receive notice of the mortgage foreclosure allows the mortgagee to buy the property at a low price and then obtain a deficiency judgment against the mortgagor which might not have been obtainable or which might have been less if the mortgagor had been given an opportunity to exercise his rights.[2]

For the foregoing reasons, I am of the view that the panel opinion raises constitutional questions surrounding Alabama's foreclosure proceedings which are just as fundamental as those raised in *Mullane, supra, Mennonite, supra, Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), and *Fuentes v. Shevin*, 407 U.S. 87, 92 S.Ct. 1983, —— L.Ed.2d —— (1972). Our en banc court should have considered the serious issues which have been raised.

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[2] This result is not obtainable in the other two states in our Circuit. *See* Fla. Stat. Ann. §§ 702.02 and 702.06 and Official Code of Ga. Ann. § 44-14-161 - 162.4 (Michie 1982). *See also Note, Mortgages—Does Foreclosure Under Power of Sale Violate Due Process Rights?*, 4 Cum.-Sam. L.Rev. 507 (1974).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

Civil Action No.

82-AR-1811-M

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,
Plaintiff,

VS.

GRADY P. MORRISON,
Defendant

[Filed Aug 26 1983 United States District Court
Northern District of Alabama, James E. Vandegrift,
Clerk tyt]

[Entered Aug 26 1983]

MEMORANDUM OPINION

Plaintiff, Federal Deposit Insurance Corporation (FDIC), foreclosed on real property securing a promissory note co-signed by defendant Grady P. Morrison (Morrison) and now sues for a deficiency judgment. Having heard testimony offered by both parties and having carefully examined the exhibits, the Court makes the following findings of material fact.

FINDINGS OF FACT

1. Morrison and Dorothy H. Ray (Ray) executed a promissory note to the East Gadsden Bank (Bank) on August 4, 1979, in the amount of $18,668.63.

2. The note was secured by a real estate mortgage to the Bank conveying for the purpose of security certain real property situated in the Green Hills Subdivision in Calhoun County in or near Ohatchee, Alabama.

3. On the date of execution of the note and the mortgage, both Morrison and Ray were unmarried. Ray was an employee of Morrison. Later Ray married, becoming Dorothy Ray Long (Long).

4. Contemporaneously with the execution of the note and mortgage, Morrison conveyed his interest in the property to Long, but remained liable on the note and mortgage.

5. On or about December 31, 1980, the Bank was closed by the Superintendent of Banks for the State of Alabama. FDIC became receiver and purchased certain assets of the Bank, including the subject note.

6. The note was in default before FDIC took over the Bank.

7. The only address appearing on the face of the note adjacent to the signatures of Morrison and Long is "Rt. 2 Bx. 41A, Attalla, Al. 35954", unmistakably in the handwriting of Long. No other address appears there.

8. Attalla is located in Etowah County, Alabama.

9. Long formerly resided at this Attalla address, but prior to or about the time the note was executed she moved into the outsized mobile home located on, affixed to and a part of the mortgaged property. The note clearly showed this address as "Rt. 1 Ohatchee".

10. Morrison has never lived in Attalla. Rather, he has long resided in Bynum, Calhoun County, Alabama, since 1953, where he is well known. He is in business there as an agent for Ryder Truck Lines and also owns a supermarket which he leases. He receives both his personal and business mail at P.O. Box 385, Bynum, Alabama 36253, and at all time pertinent would easily have received all mail at Bynum, a small community, even with the box number omitted.

11. Bynum is much closer to the site of the mortgaged property than is Attalla.

12. Subsequent to its takeover, FDIC sent a certified letter to Morrison on September 23, 1981, addressed to him at "Rt. 2, Box 41A, Attalla, Alabama 35954", purporting to make final demand on the past due note. Since Morrison has never resided in Attalla and has never received mail at that address and did not give the Bank that address, the notice was understandably "returned to sender" undelivered.

13. On November 5, 1981, FDIC sent a letter to the Postmaster at Attalla requesting Morrison's address, but this letter was likewise returned, showing "no record". FDIC never wrote to either of the mortgagors at "Rt. 1, Ohatchee", the property address shown on the face of the note. Neither did FDIC request of the Ohatchee Postmaster Morrison's address.

14. FDIC made no reasonably diligent efforts to ascertain Morrison's correct address. Common sense and a cursory inspection of the note itself would have indicated that the Attalla address appearing thereon was not that of Morrison. FDIC not only failed to investigate the matter in Ohatchee or in Calhoun County

where the property is located, but it also failed to visit the land to determine if either of the obligors lived there or if any occupant would know the whereabouts of Morrison. A simple inquiry in the area of Ohatchee would undoubtedly have led to the discovery of Morrison's proper mailing address.

15. On February 23, 1982, FDIC sent a foreclosure notice to Morrison and Long at the Attalla address, which the FDIC already knew was incorrect. Morrison did not receive it. FDIC should have known that this letter would not reach Morrison, inasmuch as the letter of September 23, 1981, to Morrison, and the letter of November 5, 1981, to the Attalla Postmaster, were both returned.

16. The mortgage instrument contained the traditional Alabama power of sale language, providing that upon default the mortgagee could sell the mortgaged property at public outcry after giving notice by publication once a week for three consecutive weeks in a newspaper published in the county where the property is located.

17. On March 12, 19 and 26, 1982, FDIC published a notice in the Anniston Star (Calhoun County) of a foreclosure sale to take place on April 2, 1982.

18. The purported foreclosure sale was, in fact, conducted on April 2, 1982, and FDIC's bid of $15,640 (85% of the appraised value of the property minus taxes, per FDIC policy) was the only and the successful bid. It gave itself a foreclosure deed.

19. After giving credit for the amount realized at foreclosure, the principal balance is $5,513.76. The

total current balance, including 12.5% per annum interest, is $6,461.67. It is this sum for which FDIC sues.

20. Morrison never received actual notice of the impending foreclosure sale. He first learned of the sale from his attorney, Dan Morris, when Morris routinely wrote FDIC regarding the status of Long's loan, and was informed by FDIC that the property had been sold.

21. Subsequent to the sale, FDIC leased the property to Mr. and Mrs. James Andrews with an option to purchase at the end of the one year Alabama statutory period for redemption. The Andrews have exercised this option, and FDIC has conveyed the foreclosed property to them by quit-claim deed. There was no evidence of the price paid by the Andrews. For aught appearing they paid an amount sufficient to make FDIC whole.

22. Morrison could have bid the full amount of the debt at the foreclosure sale. He testified that he would, in fact, have entered such a bid, but speculation on this point is unnecessary to this decision.

23. A consent judgment against Long in the amount of $7,232.37 was entered by this Court on July 6, 1983. Therefore the Court does not concern itself with the adequacy of the notice to Long.

CONCLUSIONS OF LAW

The parties have correctly conceded in the pre-trial order that this Court has jurisdiction over the subject matter and of the parties, and the Court so finds. Morrison's only defense is that he did not receive proper notice of the impending sale in order to be

able himself to bid or to generate bidders so as to protect himself from a claim for a deficiency. As part of this defense he challenges the constitutionality of notice by publication pursuant to the power of sale contained in the mortgage and as presently permitted by the law of Alabama. He primarily relies on the recent case of *Mennonite Board of Missions* v. *Adams,* 462 U.S. ——, 103 S.Ct. 2706, 75 L.Ed.2d —— (1983).

There are two issues presented:

1. Does constructive notice or notice by publication of a mortgage foreclosure sale meet the requirement of "due process" where the mortgage instrument itself and/or the state law contemplate such notice?
2. If not, did FDIC's efforts in this case to give actual notice fulfill the requirements of "due process"?

This Court is most reluctant to express an opinion which may cloud titles of a great many parcels of real property in Alabama and elsewhere in cases where there was no actual notice of an impending foreclosure sale given to parties whose property rights and/or deficiency judgment exposure are affected. This Court has tried to read *Mennonite* narrowly so as to limit the expansion of the concept of "due process" it outlines. The Court has been unable to avoid the clear import of *Mennonite.* It is the opinion of this Court that *Mennonite* is controlling in this case.

In *Mennonite,* Elkhart County, Indiana, instituted proceedings to sell mortgagor's property for non-payment of taxes by the mortgagor. In conducting a tax sale, pre-1980 Indiana law required notice by certified

mail to the "owner" (*mortgagor*) of the property, as it did in regular foreclosure sales, but did not provide for such notice by mail or personal service to a *mortgagee* of the property. *Mennonite, supra,* 103 S.Ct. at 2708. Accordingly, only the mortgagor in *Mennonite* was notified by certified mail. *Id.* at 2709. The county posted and published an announcement of the proposed tax sale. *Id.* The mortgagee (Mennonite Board of Missions) was totally unaware of the pending sale, and neither it nor the mortgagor appeared at the sale. *Id.* The property was sold, and the two year statutory redemption period ran before the mortgagee finally learned that the property in which it had an interest had been disposed of. *Id.* The purchaser at the sale brought suit to quiet title. The mortgagee defended with the contention that it had not received constitutionally adequate notice and had not received "due process".

The Supreme Court cites *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. 865 (1950), and reemphasizes the point that prior to an action which affects an interest in life, liberty or property protected by the Due Process Clause of the Fourteenth Amendment, a state must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mennonite, supra,* 103 S.Ct. at 2709. Deciding in favor of the mortgagee, the *Mennonite* Court holds that "a mortgagee possesses a substantial property interest that is significantly affected by a tax sale", and "[s]ince a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a

pending tax sale". *Id.* at 2711. If a *mortgagee* is entitled to actual notice of a tax sale, *a fortiori* a *mortgagor,* for whom there exists more than just a "substantial property interest", is entitled to actual notice. A mortgagor, such as Morrison, warrants to the mortgagee that he is an *owner* of the property, whereas a mortgagee is a mere lienor. Since the Bank here prepared the mortgage instrument and Morrison signed as mortgagor, FDIC is certainly estopped to deny that Morrison has no "legally protected property interest". Just as the tax sale in *Mennonite* could "result in the complete nullification of the mortgagee's interest", *Id.,* so too would this foreclosure sale, if valid, not only result in wiping out Morrison's interest but could materially affect the amount of any claim for deficiency. The fact that the amount of Morrison's indebtedness would be directly affected by the foreclosure leads, in light of *Mennonite,* inexorably to the conclusion that he was entitled to the same kind of notice of the upcoming foreclosure sale that he was entitled to receive when the instant suit for a deficiency was filed.

In yesteryear, a promissory note itself provided for acceptance of service by the maker in the event of default and, in effect, contained a confession of judgment. Those halcyon days of the creditor are gone forever. The evolving Due Process Clause has put an end to such practice, and the logic of *Mennonite* now knocks out constructive notice of a foreclosure sale even where the practice has previously been long recognized by state statute and is contained in the mortgage contract itself.

In *Mennonite,* the Court plainly states that "unless the mortgagee [that is, one with a legally protected

property interest, which necessarily includes a mortgagor] is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*". *Id.* The present Alabama statute which set forth the type of notice to be given a mortgagor with respect to the sale of this property under a power of sale provides:

> Notice of said sale shall be given in the manner provided in such mortgage or deed of trust or in this Code in the county where the mortgagor resides and the land, or a part thereof, is located; but, if said mortgagor does not reside in the county where the land or any part thereof is located, then such notice must be published in the county where said land, or any material part thereof, is located; provided, that notice of all sales under powers of sale contained in mortgages and deeds of trust executed after July 1, 1936, where the amount secured is $500.00 or more, shall be given by publication once a week for three successive weeks in some newspaper published in the county in which such land or any portion thereof is situated, and said notice of sale must give the time, place and terms of said sale, together with a description of the property to be sold.

Ala. Code § 35-10-8 (1975).

Under the guidance of *Mennonite,* this Court must conclude and declare that the notice given Morrison, as authorized by § 35-10-8, and as provided in the mortgage instrument, is not constitutionally sufficient under the Fourteenth Amendment. Under *Mennonite* the notice published by FDIC in the Anniston Star simply was not notice "such as one desirous of actually in-

forming the [mortgagor] might reasonably adopt to accomplish it". *Mullane, supra,* 339 U.S. at 315, and *Mennonite, supra,* 103 S.Ct. at 2711.

It is interesting to note that the commentator in *Mortgages—Does Foreclosure Under Power of Sale Violate Due Process Rights?,* 4 Cum. - Sam. L. Rev. 507 (1974) correctly anticipated *Mennonite* and analyzed the decisions which pointed the way. Although in *Northrip v. Federal National Mortgage Association,* 372 F. Supp. 594 (E.D. Mich. 1974), nine years before *Mennonite,* a United States District Court recognized that where a state statute like § 35-10-8 encourages foreclosure by advertisement instead of by actual notice there is sufficient state action to trigger a Fourteenth Amendment inquiry and to find the procedure unlawful. *Northrip,* however, did not predict the scope and breadth of the rationale in *Mennonite.* A better prediction is found in 3 R. Powell, *The Law of Real Property,* § 466[1] at 696.76(8) (1981).

The next and only other question is whether or not FDIC's efforts at mail notice pass muster under *Mennonite.* The mortgage in *Mennonite* identified the mortgagee only as "MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio". *Mennonite, supra,* 103 S.Ct. at 2711, n.4. The Court said "that the mortgagee's address could have been ascertained by reasonably diligent efforts". *Id.* It is this Court's opinion that the FDIC should have known that the address appearing on the note signed by Morrison and Long, in the latter's handwriting, was not the address of Morrison. Morrison and Long not only had different names, but the evidence at trial never suggested that the two might in any way be expected to receive mail together at the

address shown on the note beside Long's signature. The Court finds that FDIC did not make reasonably diligent efforts to ascertain Morrison's address, which could have been easily determined by appropriate inquiry. If it had ascertained that Morrison resided in Calhoun County and not in Etowah County, FDIC may have satisfied "due process" simply by addressing its foreclosure notice to "Grady P. Morrison, Calhoun County, Alabama", given the fact that Morrison was very well known in Calhoun County and further "recognizing the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed". *Id.* None of these suggested measures would have involved any expenditure of "extraordinary efforts" on behalf of FDIC to discover the "whereabouts" of Morrison. *Id.*

Even if Long had received all of FDIC's letters addressed to her at the Attalla address (which she did not), Morrison cannot be charged with actual or vicarious notice. Co-signers of a note and mortgage are not a unity. They are separate individuals with separate rights. By analogy to *Mennonite,* any actual notice to Long (who failed to take steps necessary to protect her property interest), cannot be construed as actual notice to Morrison. Id. at 2711.

Lastly, the fact that FDIC conveyed the property which it acquired at the foreclosure sale to the Andrews by quit-claim deed strongly suggests to this Court that FDIC itself has serious doubts as to the validity of its title in light of *Mennonite.*

CONCLUSION

Based on the above findings of fact and upon the necessary teaching of *Mennonite Board of Missions v. Adams, supra,* the Court concludes that FDIC's notice of foreclosure to Morrison, as suggested by Ala. Code § 35-10-8 (1975) and as recited in the mortgage instrument, violates the "due process" requirements of the Fourteenth Amendment, and that the foreclosure sale was invalid. Thus, FDIC is estopped to claim a deficiency against Morrison. By separate order the Court will dismiss FDIC's complaint without prejudice to its being refiled at such time as proper foreclosure notice is given to Morrison in accordance with this opinion, or at such time as the FDIC tenders to Morrison good and marketable title to the real property described in the mortgage and Morrison declines to pay the entire balance due.

DONE this 26th day of August, 1983.

/s/ WILLIAM M. ACKER, JR.
William M. Acker, Jr.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

Civil Action No.

82-AR-1811-M

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,
Plaintiff,

VS.

GRADY P. MORRISON,
Defendant.

[Filed Sep 6 1983 United States District Court
Northern District of Alabama, James E. Vandegrift,
Clerk tyt]

[Entered Sep 6 1983]

ADDENDUM TO MEMORANDUM OPINION

A quick deluge of *amici curiae* comment from Alabama's mortgagees in reaction to this Court's Opinion of August 26, 1983, has caused this Court, of its own motion, to reconsider the rationale for the Order which accompanied that Opinion. This reconsideration does not call for a change in the Order. It does call for an addendum to the Opinion.

It has been properly pointed out that the broad holding of the Court as contained in the Opinion of August 26, 1983, namely, that it is a violation of "due process" for anyone to conduct a foreclosure sale pursuant to a power of sale solely upon newspaper advertisement, as opposed to the foreclosure sale taking place only after a bona fide effort to provide actual

notice to those parties whose interests will be affected, is unnecessary to a decision on the facts of this particular case. The reason is, of course, that FDIC is a federal agency whose actions vis-a-vis Grady Morrison are governed by the Due Process Clause of the Fifth Amendment, whereas non-governmental, private mortgagees who foreclose after notice by publication pursuant to the provisions in their mortgage contracts arguably are not acting "under color of state law" and therefore are not limited by the Due Process Clause of the Fourteenth Amendment. On August 26, 1983, the Court unnecessarily spoke to and purported to decide the broader constitutional question. The Court now deems it appropriate to amend and to limit its Opinion by pointing out simply that FDIC and federal agencies whose actions are limited by the Fifth Amendment must, in order to effect a valid foreclosure, do more than to rely upon newspaper notice to those whose property rights are affected.

It is apparent that FDIC already recognizes this "due process" limitation upon its foreclosure proceedings. Otherwise, FDIC would not have made even the feeble effort it made to give actual notice to Morrison in this case. It simply failed to act reasonably to notify Morrison and thus did not successfully foreclose.

The Court acknowledges that what it said in its Opinion of August 26, 1983, beyond this narrow holding was and is unnecessary to the decision and now becomes *dicta*. The broader issue shall await another day, another case, and perhaps another court.

DONE this 6th day of September 1983.

/s/ WILLIAM M. ACKER, JR.
William M. Acker, Jr.
United States District Judge

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-251

In the Supreme Court of the United States

OCTOBER TERM, 1985

GRADY P. MORRISON, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his right to notice prior to foreclosure on his mortgage by the Federal Deposit Insurance Corporation.

2. Whether the Federal Deposit Insurance Corporation's effforts to provide petitioner with actual notice prior to foreclosure satisfied the requirements of due process.

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FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 747 F.2d 610. The opinion of the district court (Pet. App. 25a-38a) is reported at 568 F. Supp. 1240.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1984. A petition for rehearing was denied on May 13, 1985. The petition for a writ of certiorari was filed on August 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979, petitioner and one Dorothy Long were joint owners of real estate located in Ohatchee, Calhoun County, Alabama. In August of that year they mortgaged the property to the East Gadsden Bank (the Bank) in Etowah

County, Alabama, to secure a promissory note given the Bank. Pet. App. 1a-2a. The mortgage contract specified that, if the mortgagors defaulted on the note, the Bank would be entitled to foreclose on the mortgage after publishing notice of the time, place and terms of the mortgage sale once a week for three successive weeks in a Calhoun County newspaper (*id.* at 2a).[1] At the time of this transaction, petitioner and Long supplied the Bank only with Long's address in Attalla, Alabama, which apparently already was outdated (*ibid.*). Simultaneously with the execution of the mortgage, petitioner conveyed his interest in the property to Long, although he retained his rights and obligations as a mortgagor (*ibid.*). In August 1980, however, Long abandoned the property, leaving the bank with no forwarding address. The note then went into arrears.

In December 1980, before action had been taken against the mortgagors, the Superintendent of Banks for the State of Alabama closed the Bank. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver and acquired the note and mortgage. Pet. App. 2a. The FDIC then attempted to notify petitioner and Long that the note was delinquent. It first wrote to the Etowah County address that had been provided to the Bank; that notice was returned, marked " '[a]uthorized time for forwarding expired' " (*id.* at 2a-3a). The FDIC then attempted to obtain a forwarding address by contacting the Attalla Postmaster, who responded that he had " '[n]o address' "

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[1]This contractual provision comported with Alabama law, which provides that notice of a mortgage sale "shall be given in the manner provided in such mortgage * * * provided, that notice of all sales under powers of sale * * * shall be given by publication once a week for three successive weeks in some newspaper published in the county in which such land or any portion thereof is situated." Ala. Code § 35-10-8 (1977).

and no record of a forwarding address (*id.* at 3a; Tr. 20). The FDIC also made unsuccessful inquiries at the Bank itself (Tr. 27).[2]

Unable to contact petitioner or Long, the FDIC published the three notices required by the mortgage contract, sent personal notice to the Attalla address (Tr. 22-23), and then held a foreclosure sale. At the sale, the FDIC itself purchased the property for $15,640. Petitioner's debt was reduced by that amount, leaving a balance of $6,461 due on the note. Pet. App. 3a.

Two months after the sale, in June 1982, petitioner contacted the FDIC to inquire about the note. The FDIC informed petitioner — who, it developed, lived in Bynum, Alabama, 17 miles from Ohatchee (Tr. 42, 58) — of the foreclosure sale.[3] In August 1982 the FDIC brought suit against petitioner in the United States District Court for the Northern District of Alabama, seeking payment of the balance of his debt. Pet. App. 3a. Petitioner responded that he should not be liable for the debt because the FDIC denied him due process by foreclosing on the mortgage without providing him with actual notice prior to the foreclosure sale (see *id.* at 4a).

The district court ruled for petitioner. Relying on *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), the court held that "constructive notice of a foreclosure

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[2]While the district court found (see Pet. App. 3a) that an inquiry in the Ohatchee area would have disclosed petitioner's whereabouts, FDIC had no reason to know that petitioner resided in that area (see Tr. 28-29).

[3]Following foreclosure, Alabama law gave petitioner a statutory right of redemption, which entitled him to redeem the property by paying the amount due on the note within one year of the foreclosure sale (see Pet. App. 6a, citing Ala. Code § 6-5-230 (1977)). Petitioner, however, made no attempt to redeem the property, although he had 10 months to do so following his receipt of notification of the sale.

sale" is inadequate to satisfy due process requirements "even where the practice [of constructive notice] has previously been long recognized by state statute and is contained in the mortgage contract itself" (Pet. App. 32a). The court also held that the FDIC's efforts to provide notice by mail did not satisfy the *Mennonite Board of Missions* standard, finding that the FDIC "did not make reasonably diligent efforts to ascertain [petitioner's address], which could have been easily determined by appropriate inquiry" (Pet. App. 35a). The court therefore held that the foreclosure sale was invalid and that the FDIC was precluded from claiming a deficiency against petitioner (*id.* at 36a).

The court of appeals reversed. The court agreed that petitioner's equity of redemption — his common law right to redeem the mortgaged real estate — was property within the meaning of the Due Process Clause (Pet. App. 6a-9a). But the court reasoned that the FDIC's action had not deprived petitioner of that property. Instead, the court explained that "[t]he blame for turning the once-hypothetical foreclosure into reality lies solely with the mortgagors," whose default triggered the foreclosure sale; "[i]t ill becomes a solvent debtor whose delinquent note has contributed to his mortgagee's ruin to complain that the FDIC, struggling to minimize the damage from East Gadsden Bank's collapse, has been a more vigilant creditor than the bank" (*id.* at 10a). The court also held that the FDIC's actions did not terminate petitioner's statutory right to redeem (see note 3, *supra*). To the contrary, that right only came into existence *after* foreclosure took place. Pet. App. 11a.[4] The court therefore ruled that the FDIC's actions did not deny petitioner due process.

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[4]The court of appeals denied petitioner's request for rehearing en banc (Pet. App. 14a-15a) over a dissent by Judge Clark (*id.* at 16a-24a).

ARGUMENT

Petitioner's claim rests on the proposition that the court of appeals misunderstood *Mennonite Board of Missions* (see Pet. 6). In fact, however, that case is wholly inapposite here. Further review accordingly is not warranted.[5]

1. *Mennonite Board of Missions* involved the sale of real estate by Elkhart County, Indiana, for failure to pay property taxes. The Indiana law in effect at the time did not require that notice of the sale be provided to mortgagees of the property, although sale of the property could lead to termination of the mortgagee's rights. 462 U.S. at 792-794. Prior to the sale, notice was mailed to the mortgagor and was published; in accordance with state law, however, notice was not provided to the mortgagee. *Id.* at 794. The Court held that this scheme deprived the mortgagee of its interest in the property without constitutionally adequate notice, explaining that a mortgagee "is entitled to notice reasonably calculated to apprise him of a pending tax sale." *Id.* at 798.

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[5]We also note that, while the court of appeals found it unneccesary to decide the question (see Pet. App. 5a), it is unlikely that FDIC's foreclosure activities amounted to an assertion of governmental power of the sort that is subject to due process requirements at all. "As a party to the contract, * * * even * * * a governmentally-owned and authorized entity * * * ha[s] a right to resort to its contractual remedies just as a purely private entity ha[s]." *Warren* v. *GNMA*, 611 F.2d 1229, 1234 (8th Cir.), cert. denied, 449 U.S. 847 (1980). See *Northrip* v. *FNMA*, 527 F.2d 23 (6th Cir. 1975). And it is well-settled that a private party's use of a power of sale clause to foreclose on a mortgage does not involve state action. See *Rank* v. *Nimmo*, 677 F.2d 692 (9th Cir.), cert. denied, 459 U.S. 907 (1982); *Levine* v. *Stein*, 560 F.2d 1175 (4th Cir. 1977), cert. denied, 434 U.S. 1046 (1978); *Barrera* v. *Security Building & Investment Corp.*, 519 F.2d 1166 (5th Cir. 1975); *Northrip* v. *FNMA, supra*; *Bryant* v. *Jefferson Federal Savings & Loan Ass'n*, 509 F.2d 511 (D.C. Cir. 1974).

This principle is inapplicable here, however, because the so-called "power of sale" — the provision of the mortgage contract permitting sale of petitioner's property upon notice by publication — "was created, not through governmental enactment, but by private consensual agreement." *Bryant* v. *Jefferson Federal Savings & Loan Ass'n*, 509 F.2d 511, 513 (D.C. Cir. 1974). Unlike the mortgagee in *Mennonite Board of Missions*, petitioner thus consented to foreclosure of the mortgage after notice by publication. That the agreement containing the consent subsequently was acquired by the FDIC as a result of the Bank's failure does not affect this principle.

In such circumstances, there is no doubt that "[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver." *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185 (1972). See *Swarb* v. *Lennox*, 405 U.S. 191, 200 (1972); *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-316 (1964). Petitioner has made no claim that he was unaware of the meaning of the power of sale clause when he signed the mortgage contract, or that his signature was not knowing and intelligent; to the contrary, he acknowledges (Pet. 11) that mortgagees in Alabama traditionally have included notice of sale clauses in their contracts. Cf. *Fuentes* v. *Shevin*, 407 U.S. 67, 95-96 (1972); *Overmyer*, 405 U.S. at 185-187. The due process principles upon which petitioner relies therefore have no bearing in this case.[6]

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[6]Petitioner asserts (Pet. 6, 13-14) the existence of a conflict in the circuits on the applicability of *Mennonite Board of Missions* to mortgage foreclosures such as the one here. For this proposition, however, petitioner cites only a single district court decision. *United States* v. *Whitney*, 602 F. Supp. 722 (W.D.N.Y. 1985). And that decision itself distinguished the ruling here. *Whitney* held that a person who was liable on a mortgage in New York was not bound by foreclosure proceedings to which he was not a party. The *Whitney* district court explained that

2. In any event, even if it was bound to comply with constitutional notice requirements, the FDIC's efforts to provide petitioner with notice plainly comported with due process standards. In contrast to the county officials in *Mennonite Board of Missions*, the FDIC sent a notice of delinquency to the "last known available address" (462 U.S. at 798) — the Attalla address provided to the Bank by petitioner and Long. When that failed to reach petitioner, the FDIC made an inquiry of the Postmaster in the area, and made further inquiries of the Bank. The Due Process Clause did not require further, "extraordinary efforts" on the part of the FDIC. *Id.* at 799 n.4. That is particularly true in a case such as this one; as the court of appeals suggested, petitioner should have been aware that his failure to meet his obligations made foreclosure possible. Cf. *Northrip* v. *FNMA*, 527 F.2d 23, 33 (6th Cir. 1975). Indeed, even after petitioner received actual notice, he retained his statutory right of redemption.

That the FDIC's efforts here should be deemed adequate to satisfy the "flexible" requirements of due process (*Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)) is confirmed by a consideration of the burdens that would follow from petitioner's insistence that actual notice be provided in every case. The FDIC reports that it is in the process of liquidating more than $10 billion worth of property, involving 122,000 separate assets, from some 200 failed banks.[7] When it acquires the assets of a failed bank, the FDIC obviously must take the bank records as it finds them. Requiring the

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the Eleventh Circuit's ruling in this case was inapplicable to the facts before it "because New York law differs from Alabama law"; the former provides that a party to a mortgage cannot be held liable for a deficiency after a mortgage sale unless he was a defendant in the foreclosure action and either appeared or was personally served. 602 F. Supp. at 732 n.10.

[7]These figures are derived from the *1984 FDIC Annual Report*.

FDIC to look behind the addresses provided by the mortgagors of these assets — and to make inquiries beyond the reasonable ones made here — accordingly would impose extraordinary "fiscal and administrative burdens" on the agency. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

Supreme Court, U.S.
FILED
DEC 5
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-251

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v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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Petitioner respectfully requests the Court to allow him to point out several shortcomings in the arguments put forward by Federal Deposit Insurance Corporation in opposition to the petition for writ of certiorari.

First and foremost FDIC deliberately avoids discussing the "deficiency judgment" aspect of the "due process" problem, that is, unless at page 6 of its brief by quoting from *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972), FDIC means to argue that all due process rights can be waived by contract, including the right of a potential deficiency judgment debtor to notice of a foreclosure sale so that his is afforded some "say so" as to the amount bid at the sale which will automatically and finally establish the amount of his deficiency. FDIC treats its foreclosure in this case as if it had never sought a deficiency judgment against Morrison. If it had been willing to take the property alone in satisfaction of the debt, there would be no controversy.

The next thing which FDIC overlooks, seemingly deliberately, is the fact known to the East Gadsden Bank, and thus constructively known by FDIC, that petitioner, Morrison, and the primary obligor, Long, never shared the same residence address. If East Gadsden Bank had ever asked petitioner for his address petitioner would gladly have furnished it. The fact is that the promissory note itself indicated the address of the property securing the note, and if that address had been used in a mailing notice to petitioner, petitioner would have received the notice. FDIC seeks to insulate itself from any obligation to be reasonable by an invocation of sympathy over the fact that it took over the assets of a failed bank.

Does this excuse it from the requirement of reasonableness? If this is an excuse then every transferee of every mortgage will have the same excuse for foreclosing without a bona fide attempt to give actual notice to the potential deficiency obligor.

It is, to say the least, interesting that, at page 7 of its brief, FDIC seeks to distinguish itself rom the ordinary mortgagee while at the same time claiming at page 6 that its power of sale was exercised in compliance with the contract traditionally contained in Alabama mortgages.

When FDIC argues at page 7 that "the FDIC's efforts to provide petitioner with notice plainly comported with due process standards", it is suggesting that the appellate court should overrule the trial court's finding of fact of fact at 568 F. Supp. 1242 that "FDIC made no reasonably diligent efforts to ascertain Morrison's correct address". *Anderson v. City of Bessermer City*; ___ U.S. ___, 105 S. Ct. 1504 (1985) reiterates the proposition that an appellate court may not substitute its judgment for the trial court on a factual issue resolved on the basis of substantial evidence. Because "due process" requires "reasonableness", FDIC is forced to argue that what it did or failed to do was "reasonable". The trial court found that what it did was not reasonable.

Lastly, FDIC maintains that there is no conflict between the circuits because *United States v. Whitney*, 602 F. Supp. 722 (W.D.N.Y. 1985), is a district court decision. FDIC blithely overlooks the fact that in *Whitney* the United States itself took an appeal to the Second Circuit and then dismissed its appeal. Perhaps anticipating Morrison's petition for certiorari, the United States did not want the Second Circuit to

have an opportunity to agree of record with Judge Telesca.

CONCLUSION

For the foregoing reasons and those appearing in the original brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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